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Report by the Head of the National Election Commission on the activities carried out by the National Election Commission at the general election of Members of Parliament held on 8 April 2018

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In pursuance of section 13 § (2) of Act XXXVI of 2013 on electoral procedure (hereinafter referred to as 'Ve.'), the Head of the National Election Commission shall, after a general election, report to the National Assembly (Parliament) on the activities carried out by the National Election Commission at that election. It is therefore my obligation to inform the National Assembly of the work done by the National Election Commission at the general election of Members of Parliament whose date was set by the President of the Republic for 8 April 2018 in his decision KE 2/2018. (I. 11.).

The basic rules to be applied in general elections are determined by the Fundamental Law of Hungary, the highest level set of rules at the basis of the Hungarian legal system. One of the most important constitutional fundamentals pertaining to elections is Article B of the Fundamental Law which defines Hungary as a republic, an independent and democratic State under the rule of law where the source of power shall be the people and exercised by the people through their elected representatives or, in exceptional cases, directly. Article XXIII contains the constitutional fundamental right to vote and to stand as a candidate, precising that all adult Hungarian citizens have the right (among others) to vote and to stand as candidates in a parliamentary election.

In an election, candidates, nominating organizations and opinions compete to gain the confidence of the voters. The fundamental right for everyone to freely express his/her opinion as precised in Article IX (1) of the Fundamental Law lays down the constitutional grounds of that competition. Since the electoral campaign is a competition between nominating organizations and candidates with a purpose to influence the will of the voters and form their conviction, the requirement of equality before the law in relation to elections, namely, the principle of equal opportunities, can only prevail in a campaign period if the external framework within which nominating organizations and candidates can get their messages to the voters, is the same. Therefore, further provisions of Article IX are also highly important. According to section (2), Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion, whereas section (3) prescribes, on the basis of a provision in relation to elections, that in the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements should only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act. As to the constitutional constraints on freedom of expression, the Fundamental Law says that it may not be exercised with the aim of violating the dignity of others, or that of the Hungarian nation or of any national, ethnic, racial or religious community. As the the first sentence of section XXIX (1) – having gained a particular importance at the 2018 parliamentary election – says: „Nationalities living in Hungary shall be constituent parts of the State."

Section (1) of Article 2, defining the basic principles of the parliamentary election, sets out another pertinent rule: „Members of the National Assembly shall be elected by universal and equal suffrage in a direct and secret ballot, in elections which guarantee the free expression of the will of the voters, in a manner laid down in a cardinal Act."
At the 2018 parliamentary election the National Election Commission proceeded following the legal provisions in use during the 2014 general election of Members of Parliament. The Fundamental Law, Act CCIII of 2011 on the election of Members of

Parliament (hereinafter referred to as 'Vjt.') defining the substantive rules of the election, the rules of Act XXXVI of 2013 on electoral procedure regarding the tasks and powers of electoral commissions, and Act CLXXXV of 2010 (hereinafter referred to as 'Mttv.') on media services and mass communication, applied by electoral commissions in relation to issues arising during the electoral campaign did not change substantially compared with the provisions already in force in 2014. We can say that the 2018 parliamentary election was conducted in a legal environment well-known to the electoral bodies, nominating organizations and candidates.

I. Electoral commissions taking part in the election of Members of Parliament

The system of forums particular to the electoral commissions greatly influences the work of the NEC (National Election Commission). In terms of legal remedy procedure the electoral commissions in the 106 parliamentary single-member constituencies (PSMCs) proceed at first instance in cases linked to the administration of the election in those constituencies, and in cases of legal violation, except for certain media cases. As there are no territorial electoral commissions operating, all appeals filed against first instance decisions are adjudged by the NEC. A considerable number of first instance decisions concerning legal infringements are also taken by the NEC, in particular cases linked to media, and the NEC also handles numerous administrative cases. As a result, the NEC represents a very narrow passage for the cases to be adjudged in between the PSMCs and the Supreme Court (also 'SC'). The SC itself assessing requests for judicial review in procedures running parallel to each other in several chambers.

Pursuant to section 42 § of the Ve., the NEC shall lay down in a document the detailed rules of its procedure within 30 days following its inaugural session. These Rules of Procedure shall be published on the official web site of elections. The basically decision-oriented Rules of Procedure of the NEC, adopted on 8 October 2013, and modified on 9 February 2014 and again on 9 February 2018, favor the cases to be assessed on their merits and adjudged in a reasonable time frame. Having said that, the workload can not be substantially increased within the procedural frames defined in the Ve. and without hampering the professional assessment of cases and the keeping of the deadlines for legal remedy.

Another issue intrinsically linked to the system of forums of the legal remedy ways is to favor the cases to be adjudged within the deadlines. Appeals lodged against decisions taken by the PSMCs are forwarded to the NEC mainly by the body at first instance as appeals have to be first laid before the PSMCs. Forwarding a complaint should be done, according to the Ve., on the day of its submission. However, the 3-day deadline for adjudication is not extended for the NEC even if the electoral office, operating alongside the electoral commission at first instance, is late to forward the complaint in question, or forwards it in an incomplete way.

The legal practice of delegating members to the PSMCs changed considerably in the 2018 election (with, however, the rules of the Ve. remaining unchanged). Under section 28 § (1) of the Ve., an additional member of a territorial electoral commission, parliamentary single-member constituency electoral commission and local electoral commission shall be appointed by each of the independent candidates and nominating organisations putting forward candidates or lists in the constituency.

Under the previous legal practice, in relation to PSMCs in a parliamentary election, only nominating organizations putting forward a candidate in a constituency were able to delegate members without consideration whether they managed to draw up a national list. In legal remedy procedures in the wake of such delegations rejected, the Supreme Court took the view in its decision Kvk.V.37.372/2018/3. and then in two other decisions, that since the Ve. did not make any distinction between types of election and electoral commissions, the tasks of the PSMCs are not exclusively limited to the election in a single-member constituency. Which means that nominating organizations with a national list but failing to put forward a candidate in a given constituency, can delegate members to the parliamentary single-member constituency electoral commission (PSMC) in question.

The structure of the NEC is formed based on the previous rules. The mandate of the members of the NEC delegated by parties that had a group in Parliament between 2014-2018., came to an end on 11 January 2018, the day on which the date of the election was chosen. Out of the 23 parties putting forward a party list and the 13 national minority self-governments presenting a minority list, 15 parties and 7 minority self-governments made prevail their right as set forth in section 27 § (2) of the Ve. before the mandatory time limit as defined in section 30 § (2) of the Ve., which lead for the Commission to operate with 29 members between 27 March 2018 and 8 May 2018.

It again has to be pointed out that the Rules of Procedure, central in ensuring the efficiency of the procedures, help to keep the time frame set for the sessions even with an increased number of new members.

In the campaign period, certain members of the NEC raised two times the question of modifying the Rules of Procedure. The proposals aiming at that modification were not taken on the agenda of the NEC. The second proposal, on 6 April, aimed at a debate about a possible modification. I did not think that the timing – two days before the election – of a possible comprehensive modification of the Rules of Procedure of the NEC was right, nor did I think that it was a necessary thing to do, without mentioning the fact that the proposed new content bore some risk as to the functioning of the body. These proposals came then to the knowledge of the public, it is therefore worth saying some words on this point.

Whereas the rights and duties – as the members putting forward the proposal were keen to point out – of the elected and appointed members are (with minimal difference) identical based on section 19 § (1) of the Ve. and the Head of the Commission is himself a member elected to the NEC, it is the Ve. that distinguishes the Head of the Commission and gives him additional tasks.

The National Election Commission, as any other electoral body, is a decision-making body functioning on the majority principle and has to be able to produce, in a short period time, – even with an increased number of delegated members – written

decisions on requests that have been examined in their substance which then are fit for possible judicial reviews. The proposed modifications sought to greatly reshape the whole system of preparing and making decisions formed in 2013 and operating ever since.

By virtue of the Ve., the National Election Office (NEO) supports the NEC in making decisions. On the basis of 75 § (1) c) and d) of the Ve., the NEO acts as secretariat to the Commission, prepares cases falling within the competence of the Commission for decision, and provides the material and technical conditions for the operation of the Commission.

Within the scope of these tasks and on the basis of section 71 § (4), the Head of the NEC may give orders to the Head of the NEO operating alongside the Commission, regarding the secretarial activities of the Commission. The law allows the Head of the Commission but not the members of it nor the body as a whole, to do that. It is therefore not the members – on an individual basis –, nor a group of them, nor the NEC as a whole that instruct the secretariat in its activity to prepare the decisions, but the Head of the NEC, who has the right to give orders in this domain conferred by the law. The current procedure regarding the preparation of decisions is based on this very rule of law, whereas the proposed modifications would have put in place a different procedure.

Furthermore, in the Ve., there is no mention of the notion of dissenting opinion that the proposal sought to introduce (following the model of the functioning of the Constitutional Court), nor is there any mention of the word-by-word transcript of the sessions, nor of any possible sound recording. Neither can any one of these methods be deduced in a compulsory way from the Ve. The NEC has no intention to change its status even if nominating organizations putting forward a national list have a right to delegate members to the Commission. The NEC is not a political body even if it is party delegates that form a majority in it. The NEC is an electoral body. It can not be transformed into a mini-Parliament, nor is it a Constitutional Court or an adjudicating chamber of the Supreme Court.

As to requests concerning substantial points, the NEC is obliged, under strict procedure rules, to take a decision within 3 days. Before midnight on the third day it not only has to have taken a decision, but that decision has to be published in a written form on its website. All this (as it has already been mentioned earlier) is a major task regarding legal remedy cases at second instance as the 3-day deadline starts with the appeal being submitted to the first instance body, and it often takes one or two days for an appeal to be received or to become accessible (once it has been uploaded in the system) by the National Election Office. There were cases when an appeal got forwarded in the afternoon of the third day by a PSMO (parliamentary single-member constituency electoral office). However, failures by low-level bodies to meet a deadline can not be taken as an excuse by the NEC as the law (the Ve.) contains no reason for modifying a legal deadline.

The proposed deadlines for preparing decisions would have made it practically impossible to meet this strict legal deadline, indeed, they would have imposed internal deadlines impossible to respect, and, therefore, tasks impossible to carry out for the National Election Office and its Head.

II. An examination of the decisions of the National Election Commission (11 January 2018 – 4 May 2018)

From 11 January 2018, the day on which the date of the election was set, to 4 May 2018, the day after the day on which the result of national lists became legally final, the National Election Commission held 41 sessions. This meant 2,5 sessions on average per week knowing that the distribution of sessions was uneven, so in March the Commission held 16 sessions meaning 4 occasions on average per week. 942 decisions were taken in relation to the election. The number of sessions and decisions were similar to those of the 2014 election, but the distribution of issues differed considerably.

In this year's parliamentary election the National Election Commission operated as well as a legal remedy forum of first and second instance on the basis of rule 297 § (2) of the Ve. which concerned its competence. Apart from adjudicating requests for legal remedy, it took several decisions in matters that are in its competence by virtue of the Ve. such as, for instance:

- the registration of nominating organizations and national lists
- the determination of the number of national minority voters on the central electoral register
- the determination of the order of the national lists by lot
- the allocation, in the linear media services of the public media provider, of the time frame for broadcasting political advertisement form nominating organizations putting forward a national list
- approval of the data content of the ballot papers for party list voting and national minority list voting
- the determination of the budgetary funding for minority self-governments putting forward a national minority list
- the registration of observers
- the determination of the result of the postal voting and national list voting.

II/1. Decisions on the registration of nominating organizations, individual candidates and national lists, and on issues for failure to meet legal obligations in relation to the returning of recommendation sheets

A great number of political parties requested, in 2018 yet again, the National Election Commission to register them as nominating organizations, and, indeed, most of the requests proved to be legally justified. After the necessary administrative procedures, the Commission registered in total 100 parties and 13 national minority self-governments, representing 113 nominating organizations. By comparison, in the 2014 election of Members of Parliament, there were in total 84 organizations whose registration became legally final.

As in 2014, the adjudication of appeals against the registration by single-member constituency electoral commissions of individual candidates (in other words, when individual candidates are put forward) proved to be the heaviest workload. Indeed, in

2018 yet again a high number of voters requested to be registered as candidates. In total, 1794 were registered with a legally final decision at first and second instance.

By contrast with the previous election, the number of appeals that could be examined on their merits was significantly higher. In several cases the applicants submitted their legal remedy request on the basis of the practice put in place in 2014 by the Supreme Court and the NEC, which meant that they not only indicated the concrete parts of the text of the law (Vjt., Ve.) that had been violated, but indicated – on the basis of information from electoral offices – the number of the recommendation sheet and the concrete rows on the recommendation sheets and added reasons with a view to contesting the result of the verification of signatures and, subsequently, the decision of the commission. Following such appeals on the merits, the NEO repeated in several cases the itemized verification of recommendations. On the basis of these repeated verifications the Commission changed the decision of first instance 4 times and altered the previous decision in its substance, meaning that not only the number of valid recommendations changed, but the NEC proceeded to the registration of the candidate by contrast to the decision of first instance. On 3 occasions, the number of valid signatures went below the limit set in the Vjt., and the NEC had to alter the decision of the PSMC by refusing to register the candidate. In the other cases the revision or correction of the number of valid recommendations had no impact on the decision of the PSMC to register or to refuse a given candidate.

As I have already indicated in the 2014 report on that year's parliamentary election, the possibility for the voters to recommend more than one candidate, contains the possibility of abusing the data of the voters. Numerous legal remedy requests were filed to the Commission in which the applicant complained that based on data from the single-member electoral office of his address his signature was on the recommendation sheets of more than one candidate that he had not given his signature to. In this type of legal violation the range of reactions of the electoral bodies is very limited. The electoral offices carry out the verification of the signatures on the basis of the Ve. that does not allow more than a comparison of the data of the voter with those in the electoral list. By virtue of the Ve., there is no possibility to check the written form produced by the voter or to examine possible iterations on other candidates' sheets.

As a consequence of the short period of time available and the summary character of the proceeding, the National Election Commission could only declare, in the case of an appeal meeting all requirements, the recommendation to be invalid, implying a diminution of the number of valid recommendations. Because of the mandatory time limits, these abuses did not prevent candidates from being registered with the required number of signatures reached and the formal conditions fulfilled. The decision Kvk.V.37.290/2018/2. of the Supreme Court underlined the lack of discretionary powers of the NEC. In this precise case the aforementioned decision refers to, the NEC refused to register a list which otherwise met every other formal requirements saying that the name of the nominating organization had come up in several cases of abuse involving recommendation sheets in which criminal proceedings were already under way. The SC, by contrast, held the view that only the examination of the formal requirements was acceptable and decided to register the list of the organization in question.

In similar cases the Commission had therefore no option but to initiate actions from other bodies with competence. In two instances the Commission filed criminal complaints following requests for legal remedy, arguing that the content of the recommendation sheets was identical to the content of other parties' recommendation sheets, in fact, the data pertaining to voters were in the same order, errors in data were exactly the same while signatures of people with the same name and the same data differed totally. Similar measures were taken by PSMCs acting within their own discretionary powers.

In relation to recommendation sheets that have been returned after the time limit, or have been returned incompletely, only 41 complaints were submitted to the NEC, which is far less than the 239 complaints 4 years ago. No such decrease could be observed with fines imposed at first instance. I think that this lack of appeals filed against decisions taken at first instance is a result of the voters becoming more and more aware, based on experiences from 2014, of the notion of objective responsibility. Another reason is the fact that the circle of reasons for exemption had been greatly restricted.

Just as there was an important number of nominating organizations and candidates initiating their own registration, so there was an increased number of parties – although hardly exceeding the 2014 data – that wanted to put forward a party list. Until 16.00 hours on 6 March 2018 – the mandatory time limit prescribed in the Ve. –, 40 party lists and 13 national minority lists were presented to the National Election Commission with a goal to initiate their registration. The Commission registered all of the minority lists, whereas it registered 22 of the party lists and refused 18. Following requests for judicial review, the Supreme Court approved 6 of the NEC's decisions. In 2 cases, however, it decided to alter the NEC's decisions (see Kvk.V.37.290/2018/2., mentioned above), and to register the respective lists of the Coming Together Party (Összefogás Párt) and of the Order and Accountability Party (Rend és Elszámoltatás Párt).

Out of the 24 party lists registered with a final effect, 23 were put on the ballot papers as the Commission had deleted the list of the Party for the Poor (Szegényekért Párt) on the basis of section 254 § (2) of the Ve. and taking into consideration its guideline 1/2018., interpreting that section. The reason for deleting this list was that the number of candidates of this party registered with final effect went under the number prescribed in section 8 § of the Vjt. This decision of the NEC – applying for the first time the rule 254 § (2) since the entry into force of the Ve. – became legally final without any legal remedy being requested.

II/2. Decisions concerning the electoral campaign

Most of the decisions of the National Election Commission concerned legal remedies against violations of the campaign rules, at first and at second instance. Beside 55 decisions at first instance, 111 appeals were adjudicated.

The legal remedy requests concerned multiple issues. This year again, electoral posters played an important role in the campaign and requests for legal remedy linked to them were numerous. The question of the legal notice on electoral posters came again into focus after the 2016 referendum and uncertainty in applying the law

arose in relation to the first sentence of section 144 § (5) of the Ve. This one stipulates that on certain public buildings or on specific parts of public domain, the placement of posters and billboards may be prohibited by decree by the municipality, in the Capital by the municipality of the Capital for reasons of protection of monuments and the environment.

The NEC applied the system of rules formed by the Supreme Court during the 2014 election. This says that the production and placement of posters are manifestations of the freedom of expression in an electoral campaign and, therefore, by virtue of section 144 § of the Ve. – if interpreted correctly –, provisions of section 144 § govern exclusively the placement of electoral posters. To the Supreme Court, electoral bodies can only examine compliance with the law and cannot apply decrees that would provide for the placement of posters in connection with the highway code as the provisions of the Ve. concerning posters constitute a closed system of rules governing their placement as well as their removal.

In addition to this system of rules, the SC formulated in the 2016 referendum that it has to be straightforwardly identifiable who is the person the poster urges voters to support and who commissioned the poster to be produced. The NEC took the view that this latter requirement would be satisfied, with regard to the 2018 parliamentary election, not only with the use of legal notices or easily distinguishable inscriptions on posters, but, in the case of a candidate whose political preference is known to the whole country – in fact, the most high-profile Hungarian public figure –, without any straightforward designation of the nominating organization on the basis that general elections differ greatly from referendums in that it is not 'yes-no' answers that compete but candidates and political parties. The Supreme Court did not accept this view and declared that a violation of the law had been committed in connection with that poster bearing the image of the candidate in question, leader of the list of his party, and displaying the name of the nominating organization which placed the poster in a way that it was only hardly readable from a distance. The case was laid before the Constitutional Court that annuled the decision – contrary to the one taken by the NEC – of the SC. In its decision 3134/2018. (IV. 19.) AB, the Constitutional Court (hereinafter also referred to as 'CC') took the view that if the provisions of section 144 § (4)-(7) of the Ve., putting restrictions on where posters should be placed, and, subsequently, restricting the freedom of expression, constitute a closed system of rules, the SC cannot require that posters be immediately recognizable, a condition not set out in the Ve.

Restrictions concerning the placement of posters, contained in section 144 § (5) of the Ve. as well as in local self-government decrees, became another important issue. The National Election Commission would examine whether the restriction in a given local self-government decree was based on section 144 § (5) of the Ve. To decide whether the decree is contrary to other rules of law or whether it goes beyond the authorization given by the Ve. pertains to the Supreme Court by virtue of section 12 § (4) a) of Act I of 2017 on the rules of administrative procedure.

During the campaign, however, the SC required in some of its decisions – for example in decision Kvk.III.37.400/2018/2. – for restrictions in local self-government decrees linked to reasons of protection of monuments and the environment to be examined not only with respect to their form but also with respect to their substantial

content. Which would mean that an electoral body should form an opinion not only about whether a poster mentioned in a legal remedy case has been put up (or removed) in a place that is protected by a local self-government's decree, but also about whether the place in question designated in the decree has been concretely named. The electoral organ should also say whether the protection is justified under section 144 § (5) of the Ve.

At the end of revision procedures concerning the substantial content of decrees, the decisions of the Supreme Court led to different outcomes as, for example, the same decree in the city Hatvan got under revision three times in relation to posters and on two occasions the SC approved the decree, whereas on one occasion it concluded that the restriction contained in it did not comply with section 144 § (5) of the Ve.

As it can be seen, even the SC does not have a shared view on concrete questions when reviewing substantial contents and, in the light of that, we could not therefore expect the electoral commissions to have a shared practice in these matters which are more complexe than the average. It would also raise a big problem of principle if the electoral commissions had to examine the substantial content of those decrees beyond the simple formal point of views because the boundary between ad hoc decisions and decisions that could be seen – on the basis of their content – as subsequent constitutionality review could easily be blurred.

Another important issue of the campaign was the collaboration between print media, online media and linear service providers, which includes the broadcasting of political advertisements and electoral advertisements, as well as news services. Editorial work in news services can also influence the voters' will and can, therefore, be assessed during the election campaign.

Early on in the campaign editorial practice in periodicals issued by local self-governments mostly for free and in wide circulation came under scrutiny.

The decision Kvk.III.37.236/2018/4. of the SC, in the early phase of the electoral campaign, contained several statements of principle which the NEC then put in practice during the campaign. The first point of principle was that in the case of the print media any possible violation of the principle of equal opportunities as set out in section 2 § (1) c) of the Ve. should be examined along the same lines as for the totality of programmes. Whereas media contents transmitted in media services composed of moving images and sounds consist of programmes, in print media editions are made up of articles and images. As in linear media services programmes have to be assessed in their totality as a programme flow, so in print media it is the articles and images making up the edition in question that have to be examined. This view ruled out the practice of the NEC which meant by programme flow in print media the totality or major part of editions published during the campaign. According to the SC that practice of the NEC would not allow an efficient examination and sanctioning of violations of the principle of equal opportunities.

Participation of local self-governments in the electoral campaign was further concretized by the SC when it stated that a press product of a local self-government cannot carry out any electoral campaign activity that would go beyond the publication – guaranteeing equal opportunities of being published to other actors as well – of political advertisements as defined in 146 § b) of the Ve. Since, based on 141 § of

the Ve., any activity carried out in a campaign period can qualify as campaign activity if it influences the will of the voters or tries to do so, editorial activity got to be regulated within very strict legal framework.

The Supreme Court took the view that it qualifies a violation of equal opportunities when, in a campaign period, a candidate is circulated in a local press product regardless of his being a candidate or because he discharges other functions or as someone who is not linked to the electoral process, but his presence in the media reaches a level where doubts about the neutrality of that press product may arise as the press product in question seems to be campaigning for a nominating organization or a candidate.

II/3. Decisions determining the result of the election

After the day of voting several legal remedy requests were submitted to the Commission in which the requesters complained about the discharge of functions by the NEO linked to the setting up and secure operation of the IT system and to the operation of the official website of elections as defined in 76 § (1) c) and g) of the Ve. The reason of these requests was that on the day of voting, after having displayed the turnout data at 9.00am, the portal switched to a back-up portal. This back-up portal is an application built upon a technology that had been used and operated several times. It is in fact an IT solution capable of facing a more massive load, generating a reduced flow of data and providing static pages. The reason behind switching to that was to make sure that the National Election Office is able to meet smoothly a high level of interest in the turnout and preliminary result. In each of its decisions, the NEC emphasized that the reduced mode of operation of the website did not have any impact on the functioning of the underlying IT systems since these operate within a network that is separate and protected. But because, for some days, data which should have been available (e.g. decisions, guidelines of the NEC dating before 8 April 2018 or availabilities of electoral bodies) – by virtue of the basic principles of the Ve. – were not accessible, the Commission declared that violation of the law had been committed.

Those filing an appeal or judicial revision request, referenced in their legal remedy requests against constituency results and national list results the reduced data content and reduced functionalities, the fact that data of previous elections were not available for a short time. In the absence of reasons given or any causal link between the determination of the results and the data content of the website, neither the NEC nor the Supreme Court did accept these requests.

On the basis of sections 294-296 § of the Ve., the result in the single-member constituencies is determined by the parliamentary single-member constituency electoral commission with competence whereas the result of the national list voting is determined by the National Election Commission. An important number of appeals were submitted against decisions determining the result in single-member constituencies. By comparison, while in 2014, 5 appeals had been lodged with the NEC, in 2018 131 remedy requests (129 appeals and 2 objections) were assessed by the Commission which challenged decisions determining the result in single-member constituencies. Of these, a great number had the same content when contesting constituency results. The Commission had changed the constituency

results in one instance, but no new winner was declared. On this occasion, section 197 § of the Ve. had to be applied both for the polling district result and the constituency result because of 2 additional ballots, the electoral organs having failed to do so. In the case of the other appeals, a majority of the members of the NEC took the view that the remedy requests had not cited legal violations nor had they referenced proofs which could have made it at least plausible that legal violations had been committed.

In this year's election 4 constituency commissions only recorded their decisions without taking formal resolutions. On the basis of the Ve., commissions have the obligation to take a resolution as to the constituency result, the mail voting result and the national list voting result. The records precising the arithmetic details contained in the decree 1/2018. (I. 3.) IM (hereinafter 'IM decree') on the detailed rules regarding the carrying out of tasks pertaining to electoral offices, the determination of the data of the result of the election synthetized on a national level, the forms to be used in the election and the amendment of certain decrees regarding the election, of the Ministry of Justice, are part of that resolution.

Legal remedy requests were submitted in the cases mentioned above on the grounds that the PSMCs in question had failed to act. The NEC upheld the objections raised on the grounds that the electoral body had failed to respond, but it rejected the appeals against the written records of decisions – indeed, no appeal can be filed against written records of decisions by virtue of section 221 § (2) of the Ve. In each 4 cases the Commission added the necessary resolutions and determined the constituency results in conformity with the records. In some cases PSMCs took the decisions determining the result after the period (the sixth day following the day of voting) fixed in 294 § (2) of the Ve. The Nec adjudicated several appeals referencing a violation of the law with decisions taken with delay by PSMCs. The persons filing these appeals sought annulment of the decisions and a repetition of the voting. In these cases the NEC stated that 294 § (2) had been violated by delaying decisions but it did not think that any further legal consequence would be justified. On the basis of the same facts, the Supreme Court also expressed the view that a failure to meet the deadline cannot in itself produce an annulment of the result determined because the result would have been in any case the same. There is no such legal consequence of failing to meet the deadline defined in 294 § (2) of the Ve. as there is, for example, in 231 § (1) b) of the Ve., of failing to meet the 3-day legal remedy deadline for judicial review request. Determination of the result in a constituency is a duty belonging to the given PSMC but no impairment of a right was suffered here with the delay.

In the appeals contesting decisions by the PSMCs determining the result in single-member constituencies the requestors sought – beyond the violation of the law stated – in almost every instance 218 § (2) c) of the Ve. to be applied, in other words, an annulment of the constituency result and a repetition of the voting procedure.

A majority of the members of the National Election Commission took the view that an application of the legal consequence under 218 § (2) c) of the Ve. (namely, annulment or repetition of the whole election procedure or the part of it that is involved in the legal remedy) is possible only in procedures initiated with objections. An appeal against the decision of a PSMC determining the result may only aim at a

correction being the fact that this type of legal remedy can only be based on a violation of the rules of ballot counting which can be remedied in a legal remedy process. The Ve. goes further in concretizing this in relation to legal remedies against the result of election when it provides for the recount of ballots. Indeed, this is the repetition of one of the most decisive phases in an election process – that which is at the basis of the determination of the result.

In its decisions Kvk.VI.37.494/2018/2., Kvk.I.37.495/2018/2. and Kvk.VI.37.524/2018/2., the SC made it clear in addition to the interpretation of the law by the NEC that the annulment of the result in a single-member constituency – in other words, the application of 218 § (2) c) of the Ve. – can exclusively occur within a legal remedy process initiated against the decision determining the result. The reason for that arises – the Court explained – from the provisions of 211 § and 214 §. Under these provisions, legal remedies contesting results are separate from objections against violation of the rules and basic principles of the election process. On the other hand, when a legal remedy procedure (objection) is initiated on election day against a legal violation committed by the ballot counting commission, there is still no result determined; therefore the result in a polling district cannot be contested separately, but only – according to 241 § (1) of the Ve. – within a legal remedy submitted against the decision of the ballot counting commission determining the result. To the Supreme Court it would be illogical and, in any case, it cannot be deduced from the Ve. that a decision which has not yet been taken should be deemed – on the basis of an objection – to be an infringement and, therefore, annuled.

However, decision Kvk.IV.37.504/2018/2. seems to run counter to that view. In this decision the SC argued similarly to the interpretation of the law by the NEC and, regarding the legal consequences that could follow any appeal against a result, made it clear that „The requestors submitted their appeal against the decision of the electoral commission determining the result of the election on the basis of 241 § (2) a) and b) referencing an infringement of the rules pertaining to the determination of result. This appeal does not allow an annulment of the result, it only makes it possible for the ballots to be recounted as set out in subsection (3). The aim of these rules is to make the electoral commissions – when adjudicating appeals – take decisions on the merits. In fact, in the case of an annulment a new procedure should be conducted, which takes time. The regulation pertaining to elections has this particularity to make decisions on the merits to be taken in the shortest of time possible. In a legal remedy procedure the election process or part of that process involved in the legal remedy can only be annuled and repeated if the electoral commission upholds the objection raised against the activity and decision of the ballot counting commission, except for the determination of the polling district result.” [218 § (2) c) of the Ve.]

This view of the SC sheds light on the fact that a shared interpretation of the rules pertaining to appeals contesting the result of elections – a special kind of legal remedy ways –, although they have been part of Act C of 1997, still poses considerable challenges to those bodies applying the law.

In spite of the great number of appeals only 13 judicial review requests were submitted against 12 NEC-decisions which had been taken following the revision of

PSMCs' decisions determining the result. This means that only 10% of the requestors sought to modify the NEC's decision rejecting their appeal, whereas 90% of the NEC's decisions adjudicating and refusing appeals filed against the determination of results became – in the absence of any request – legally final. The Supreme Court approved 10 times the decisions of the NEC, while rejecting 3 revision requests without any examination on their merits.

The National Election Commission determined the result of postal voting in its resolution 825/2018. The Supreme Court approved that in its decision Kvk.III.37.503/2018/6. In its decision IV/758/2018. AB, the Constitutional Court rejected a constitutional complaint seeking that decision by the SC to be declared contrary to the Fundamental Law and annuled. As reasons for that rejection, the CC made several important statements affecting the determination of the result of postal voting. First of all, it made clear that „there isn't any provision in the Ve. that would prescribe the use of return envelopes or adhesive security tapes on envelopes, or that would imply invalidity in absence of these methods. There is no such legal restriction in the Ve. as that which the SC deduced from the principles underlying the electoral procedure as set out in the Ve. and on the basis of which it qualified invalid those ballots arriving in envelopes different from the ones that had been sent to the voters arguing that the absence of possible damage made to these envelopes could not be established. No prescription that would restrict the exercise of a fundamental right can be added through judicial interpretation of the law in the absence of an express legal rule because that would be a case for the necessity to restrict that fundamental right, which is the scope of the legislation." Other important statements of that decision concerning the process of postal voting and the validity of postal ballots were that the envelopes containing the ballots – by contrast with voting in person in the polling districts – had not been under the continuous control of the electoral bodies. The CC considered expressly the National Election Office being only able to declare that an envelope hasn't been opened if the adhesive security tape remained undamaged, to be a question of fact. It is on the basis of the security tapes having remained undamaged that the NEO could declare the 225 025 ballot papers referenced in the annex of the resolution 825/2018. NVB to be valid beyond doubt. This should not have been transformed into being exclusively a question of law during the NEC and Supreme Court proceedings, and should not have subsequently been revised as such. This view of the CC is reinforced – the Constitutional Court says – by the resolution No. 695/2018. of the NEC which was not challenged by any legal remedy request. This resolution held the view – in relation to an objection – that „voting documents whose return envelope, as it can be seen on the signe placed on the adhesive security tape, has been opened after having been closed, and then closed again, cannot be considered to be closed". To the CC, this statement „is important because the CC cannot take into consideration that part of the SC's decision which erroneously judges the objection as being a question of law if, in fact, that objection challenges exclusively the question of fact. No constitutional comlpaint shall be based on a question of fact. This limitation shall not be ignored in electoral matters."

After that the results of the single-member constituency voting and postal voting had become final, the NEC determined, on 27 April 2018, in its decision No. 964/2018., the national lists' result in conformity with the deadline fixed in 296 § (2) of the Ve.

Five judicial review requests were lodged against this decision out of which one was rejected by the SC without any examination on the merits. In the procedure initiatied with a judicial review request arguing that section 197 § of the Ve., providing for the additional ballots in the ballot boxes of the polling districts to be declared invalid, was contrary to the Fundamental Law and contesting the result of the national lists mainly for this reason, the SC upheld the NEC's decision.

The Supreme Court also ordered, in 4 polling districts, the ballots cast for the lists to be re-counted, and altered the decision of the NEC determining the national lists' result. After the re-count and the subsequent modification in the records of national list voting, no change in the distribution of parliamentary seats ensued. In its decisions Kvk.I.37. 551/2018/9. and Kvk.I.37.552/2018/9., the SC explained that an annulment of the result and a repetition of the voting in the list voting can only occur if the legal violation impacts the distribution of parliamentary seats. No such legal violation was held as probable by any of the requestors. Based on the decisions of the SC mentioned above, the national lists result became final on 3 May 2018.

II/4. Summary

Procedures of the Supreme Court were initiated on 162 occasions against 942 decisions taken by the NEC at first and at second instance. In 127 cases, the SC conducted examinations on the merits. In 35 cases, the requests were rejected without any examination on the merits. Out of the 127 cases examined on their merits, the SC approved the NEC's decisions in 104 cases which represents 81,88% of the examinations on the merits. On 23 occasions – representing 14,19 % of the 162 judicial review requests – it opted for the decisions to be altered (this representing 18,11% of all the legal remedy requests).

Detailed tables in the annex show the statistics pertaining to the decisions of the Commission.

III. Guidelines

Four guidelines were issued by the National Election Commission during the 2018 parliamentary election period. They reviewed earlier guidelines in relation to parliamentary elections and updated their content where it was necessary. The NEC issued two guidelines on principles interpreting the deletion of lists as defined in 254 § (2) of the Ve. and the commencement of voting including the rules governing the withdrawal of candidates (deadlines, formal requirements).

When elaborating both guidelines, the Commission interpreted the relevant legal rules within the framework of the competence rule set out in 51 § of the Ve. and made statements of principle. I would argue that a finely honed regulation – similar to the guidelines mentioned – concerning the deletion of lists and the deadlines regarding the withdrawal of candidates – being the fact that these regulations deal with the „protagonists" of every electoral process – make it necessary to adopt even more detailed legal rules. During the 50 days of the electoral campaign in a strict sens, candidates and nominating organizations compete to gain the support of the voters. Unequivocal rules as to the withdrawal of a candidate or a list affecting the competition – the very essence of every election process – is a shared interest of both the electoral organs and the participants in the political competition.

IV. Some proposals on the basis of experiences arising from the application of law

Section 76 § (1) l) of the Ve., inserted by section 4 § (1) of Act LXXXIX of 2013, confers the power to initiate new laws only on the National Election Office but not on the Head of the National Election Commission. I would, therefore, like to share with the highly esteemed National Assembly my proposals based on experiences arising from applying the law whose goal is to develop the legal regulation concerning the election.

The 2018 parliamentary election revealed again that the rigid rules of the Ve. governing the process of the registration of a voter on an electoral list other than his/her original electoral list, challenges greatly, in certain polling districts, the electoral bodies as well as the citizens wishing to exercise their right to vote. Currently, if, on voting day, a voter is not in the area of the polling district of his Hungarian address, he/she may request, until 16.00 o'clock on the second day before voting day, to be able to vote in the settlement where he/she is on the day of election. The Ve. designates one polling district for those reregistered on the electoral list of another polling district independently of whether their number is 2 or 3 dozens or several thousands. Experience shows that many submit their request in the last hours of the deadline. Which means that the electoral bodies have to face the problem of ensuring the materials necessary for voting for those having reregistered themselves in the very last minutes. They have a period of one and a half day to adjudicate the requests and to make the arrangements necessary for thousands of voters to be able to vote in the given polling district. It would be a step forward to set the final date for reregistering for an earlier date – the fifth or fourth day before voting day – and by doing so allow electoral bodies to make the necessary arrangements to avoid the long queues of citizens wishing to vote. It would also be justified to make a law that would permit – if those having reregistered make the total number of voters in a polling district electoral list to go beyond one thousand – the opening of another polling district. I connection with all that it would be reasonable to widen the powers of injunction of the Head of the NEO so she can give direct orders to the members of the local electoral offices administering the election.

I have already pointed out that the centralized role of the NEC covering all administrative issues contains the risk of adjudication deadlines not being kept. This risk may, however, be reduced by a relative widening of the system of forums and the unification of the procedure deadlines. Calculation of time limits differ for issues which are transferred to another forum and for legal remedy requests to be forwarded. With issues that are transferred, the time limit for adjudication begins on the day on which the legal remedy request is received by the body entitled to judge it. If this method of calculating time limits would be applied in a unified way for requests forwarded, the infringement – forwarding with delay – committed by the office operating alongside the commission of first instance would not imply almost mechanically the infringement by the body adjudicating that request, namely the adjudication with delay.

As to the appointment of members of the electoral commissions, the application of the Supreme Court's point of view didn't cause any problem in this parliamentary election. Having said that, the fact that the Ve. doesn't distinguish between types of

election and commission from the point of view of who can be member has totally different implications in local self-government elections. In local self-government elections, an independent candidate for a seat in the body of representatives or for the seat of mayor can delegate a member to the local electoral commission as well as to the territorial electoral commission, which could in turn inflate these commissions to the point of becoming unoperational. If application of the law on this point remains as it is now, only an amendment of the legal rules pertaining to delegation could exclude this theoretical possibility.

Experiences from the 2018 electoral process reinforced the view that in order to protect personal data of the voters and to make the will of the voters prevail, it is necessary to revise the legal institution of recommending more than one candidate. And if maintained, guarantees must be implemented into the regulation which would efficiently protect citizens against abuses with their data.

If the institution of multiple recommendation is maintained, I would argue for the territorial electoral commissions (TEC) to participate in parliamentary elections primarily as second instance legal remedy forums where decisions imposing fines related to the registration of candidates or recommendation sheets not being handed back in time, can be challenged. The reason to this is that both types of procedure are formalized with commissions proceeding without their discretionary powers, therefore these issues are simpler. This would considerably reduce the workload of the National Election Commission without disproportionately charging the TECs because territorial distribution would result in evenly distributed tasks. In order to make sure that nominating organizations are represented, political parties with a list and having a candidate in a county constituency should be entitled to delegate a member to the TEC or to one of the capital's commissions in the case of a candidate in one of the capital's constituencies. This involvement of TECs in bringing decisions makes it necessary to designate courts with competence in order to ensure a nation-wide shared practice in judicial review procedures (the Supreme Court or a regional court for the whole country).

The regulation concerning posters has to be precised. The closed system of rules currently in place is nothing but a loose regulatory framework not allowing a settlement of the questions of legal notices on posters being recognizable or the limits of legality in relation to electoral posters placed on private properties. As the Ve. contains substantive restrictions only on objects named taxatively – walls of buildings and fences –, the right to place posters as a form of the freedom of expression and the right to own property are colliding continuously.

The application of provisions governing the question of where posters shall be placed raised the necessity for the NEC to have the independent right to initiate – with issues in its competence – a procedure of subsequent constitutionality review before the CC and the SC. Currently no such motion can be introduced by the NEC. The NEC can only contact other bodies under 44 § (2) of the Ve. with such a proposal and may – once the body in question has taken its own decision – initiate a constitutionality review.

The legal consequence defined in 218 § (2) c) of the Ve. affects the merits of the conduct of the election – it is, in fact, the severest sanction that could occur in an

election: the annulment and repetition of the election procedure or part of it. Having taken into consideration the contradictory practice of the SC in the 2018 election, the bodies applying the law need more precisely delimited rules as to the procedures and other possible conditions with which this sanction may be applied. It is important to reach a shared interpretation of the rules relating to appeals against the result of election. Those rules figured already in Act C of 1997, but they are still causing problem in 2018 to the bodies applying the law.

Another unregulated question that concerns the legal status of representatives is the designation of the body that a candidate for a parliamentary seat may contact after voting day but before the inaugural session of Parliament if, on the basis of a legally final result, he/ she has obtained a mandate from which he/ she wants to resign or other cases of withdrawal occur (death, loss of the right to vote). An amendment would be necessary so that it takes into account the case when a withdrawal from a mandate occurs after the voting but before the result of voting becoming legally final, or before the inaugural session of Parliament taking place. Such an amendment should determine the procedure rules for the candidate, for the nominating organization and for the bodies concerned (electoral commissions, Parliament).

I suggest that in the period after the 2019 European and local government elections the highly esteemed National Assembly examine the possibility of electronic voting (or putting forward candidates by electronic means) with the necessary guarantees regarding data protection, secrecy and reliability.

There are two things to be considered in relation to judicial review of the NEC's decisions. One is the basic principle of publicity. Although 40 § (1) of the Ve. prescribes that only the electoral commission's meetings shall be public, 2 § (1) f) of the same law spells out that the basic principle of the publicity of the electoral procedure shall be prevalent when applying the rules governing the electoral procedure. The courts, and therefore the Supreme Court take their decisions by choosing among the possibilities set out in the Ve. When a decision of the NEC is altered, the legal dispute gets to be resolved on its merits, and the electoral issue is closed. With the application of the rules pertaining to out-of-court proceedings, taking decisions (orders) and publishing them is done with the exclusion of the public. The decisions taken and the reasons underpinning them are communicated to the parties concerned by sending them electronically the order. Voters are informed by putting the decisions on a web site. The step-by-step process of judicial decision-making, as well as every detail of the debate over the draft serving as a basis for a decision may not deserve total publicity, but publication of the decisions in sessions may well be justified, and therefore elaborating the legal framework for this would be of interest.

The importance of the second point concerning judicial procedure was highlighted by four resolutions brought in the review procedure linked to the resolution No. 964/2018. of the NEC which had determined the national lists' result (resolutions No. Kvk.V.37.548/2018/14., No. Kvk.I.37.552/2018/9., No. Kvk.I.37.551/2018/9. and No. Kvk.VI.37.550/2018/2.). Requests submitted against the same NEC decision were judged by different chambers bringing different orders with the result that there is now one order approving that decision of the NEC (order No. Kvk.VI.37.550/2018/2.) whereas there are three which partly approve it, and slightly alter it (regarding the number of votes). By this way of proceeding, the SC practically maintained the lists'

result four times: on one occasion without any modification, on three occasions with minor modifications. This could have been avoided by unifying the proceedings that had been initiated over the same issue. But it could also have been avoided with a cardinal law making it mandatory to set up a special court chamber with 5-7 or 9 persons in the Supreme Court which would review judicial decisions in electoral matters. This special court chamber could then ensure a shared interpretation of all requests. (By these methods, we could also prevent different decisions from being taken when interpreting the same legal provision in the context of identical facts, as it has been demonstrated in connection with 144 § (5) of the Ve. which provides for the placement of posters.) Qualified professionals could then help this special chamber in its activities. A similar solution is set out in Act CLXI of 2011 on the structure and administration of courts in connection with the review of legality of local government decrees (the chamber of local governments of the Supreme Court).

V. Afterword

I think that as a result of the professional and efficient work of the electoral bodies the 2018 general election of Members of Parliament was conducted with success and in conformity with the legal provisions.

As the Head of the National Election Commission let me thank all members of the electoral bodies participating in the successful conduct of the 2018 election of Members of Parliament. Through their devoted and professional work it has been now for the eighth time that they provided substantive help for voters in exercising their most important political right.

Let me say a special word of gratitude to the members of the National Election Commission. Their perseverance indispensable to discharging a considerable workload, and their constructive approach necessary to conduct successfully the activities of the highest electoral body with a considerably increased personnel.

And finally, on behalf of the National Election Commission, I wish the newly elected parliamentary representatives and spokespersons had the assiduity in the performance of their work dedicated to the people and the national minorities of our country.

And now I would like to ask the highly esteemed National Assembly to accept this report.

Budapest, 4 May 2018

Prof. Dr. András Patyi